

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 18-cv-3065

ROCKY MOUNTAIN WILD, INC., a Colorado non-profit corporation;

Plaintiff,

v.

UNITED STATES FOREST SERVICE, a federal agency;
UNITED STATES DEPARTMENT OF AGRICULTURE, a federal agency;

Defendants.

COMPLAINT

I. INTRODUCTION

1. This suit seeks to remedy violations of the statutory rights of Rocky Mountain Wild (“RMW” or “Plaintiff”) caused by the Defendants United States Forest Service (“FS”) and United States Department of Agriculture for failing to comply with the statutory deadlines for responding to a request for documents made pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.* Instead of determining whether to fulfill the request, Defendants questioned RMW’s eligibility for a fee waiver, which it later granted. Defendants also avoided and delayed its determination by unreasonably attempting to narrow the scope of the request.

2. The FOIA Request was filed on July 20, 2018 to inform RMW’s participation in the Forest Service administrative proceedings regarding the Village at Wolf Creek. The Forest Service decided to take action on remand, without regard to the Colorado District Court Order

entered by Senior Judge Matsch that set aside the previous agency action (*RMW et. al v. Dallas*, 15-cv-01342–RPM) and despite ongoing Court of Appeals consideration. *See RMW et. al. v. Dallas*, Nos. 17-1366, 17-1408 & 17-1413 (submitted on the briefs September 15, 2018). In those cases, the Forest Service took action to unlawfully approve the development proposal, while also withholding agency records responsive to RMW’s FOIA requests.

3. In the present case, Defendants have not made a determination on the July 20, 2018 FOIA request, have not detailed its search for records, have not asserted any exemptions, and have failed to disclose any responsive records; all in violation of FOIA’s mandatory deadlines that implement the congressionally imposed duty to provide prompt public access to public records. The pattern of FOIA violations by Defendants has prejudiced Plaintiff’s ability to fully participate in the ongoing administrative processes for federal approvals of the Village at Wolf Creek (*RMW v. Forest Service*, 14-cv-02496-WYD-KMT (D. Colo. 2014) and *RMW v. Forest Service*, 15-cv-00127-WJM-CBS) which could negatively impact the interests of RMW’s members.

4. Plaintiff sought to avoid this litigation by requesting a delay in the comment deadlines and deadlines for filing objections. Plaintiff recently contacted the FS and requested an estimated date when the Forest Service would meet its FOIA duties and release the responsive records. The Forest Service refused to provide an estimated date for FOIA compliance. Not a single agency record has been provided in response to the July 20, 2018 FOIA request. By contrast, the Forest Service has continued to move forward with the underlying administrative processes. Judicial remedy is required to address both RMW’s FOIA rights and Defendants’ disregard of basic requirements of administrative fair play and due process.

5. The Forest Service's pattern, practice, and policy of delay and withholding access to records involving the Wolf Creek Village proposal that are not subject to any FOIA exemption stretches back to at least 2005. *Colorado Wild v. Clark*, 05-cv-01173-JLK-DW. The FOIA violations have hindered RMW's participation in various agency review processes, and prevented Defendants from carrying out its land management duties in conformance with federal laws mandating informed decisionmaking and public participation. The ongoing pattern of FOIA violations constitute a violation of the Forest Service duties to comply with federal law, particularly the National Environmental Policy Act ("NEPA") before granting expanded access for the Village at Wolf Creek. *Colorado Wild*, 06-cv-02089-JLK-DW (ECF No. 147). The Forest Service FOIA violation prevents compliance with the NEPA mandate that agencies include the public, and release agency records pursuant to FOIA as part of their NEPA duties, to the fullest extent possible. 40 C.F.R. §1506.6(a). This pattern of FOIA violations also violates NEPA and warrants reinstatement of the preliminary injunction granted by Senior Judge Kane in 2007. *Colorado Wild Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213, 1215 (D. Colo. 2007).

6. Plaintiff's FOIA request seeks information in agency records about the agency activities and proposed transfers of interests in federal land related to the proposed Village at Wolf Creek. On November 19, 2018, Defendants denied pre-decisional administrative objections filed by Plaintiff and other parties opposing the desire by private developers for expanded private access across National Forest System lands to a private inholding created by a controversial 1980s land exchange. A final Record of Decision could be published in the near future. Plaintiffs requested an extension of the 45 day objection deadline (September 5, 2018) announced by the Forest Service, partially because of the Forest Service's violation of FOIA's statutory deadlines. The

Forest Service denied RMW's request for an extension. Plaintiff informed the agency of its intent to supplement the objection with new information contained in the anticipated FOIA release.

7. Expanded road access is sought to enable development of a 10,000 person village on Wolf Creek Pass, known locally as the Village at Wolf Creek. Plaintiff has successfully challenged the use of public land for this private development in the past. *See Colorado Wild, Inc. v. United States Forest Service*, 523 F. Supp. 2d 1213, (D. Colo. 2007); *Rocky Mountain Wild v. Dallas*, 15-cv-01342-RPM. Plaintiff is engaged in an ongoing effort to educate the public and advocate for what is considered one of the most biologically important areas in the Southern Rockies, which provides habitat and migration pathways for elk, deer, black bear and the federally threatened Canada lynx, among other species. By violating FOIA, Defendants have violated Plaintiff's rights to timely access agency records necessary to prepare a meaningful administrative objection to the agency's decision, which includes violations of the National Environmental Policy Act.

II. JURISDICTION AND VENUE

8. This Court has jurisdiction over this action pursuant to 5 U.S.C. §552 *et seq.* (FOIA), and 28 U.S.C. §1331 (federal question). The District Court "shall determine the matter *de novo*" and has broad discretion to structure judicial review of the case. 5 U.S.C. §552(a)(4)(B). The Court retains its full equitable powers to fashion and impose effective remedies for agency FOIA violations.

9. Venue in this Court is proper. 5 U.S.C. §552(a)(4)(B). Plaintiff is a Colorado non-profit corporation that resides in Denver, Colorado. The focus of this FOIA request is ongoing federal land management on Wolf Creek Pass, in the Rio Grande National Forest in Colorado. All

documents requested by Plaintiff concern issues related to and/or activities conducted by the Federal Government.

10. The failure to make a lawful determination on Plaintiff's July 20, 2018, FOIA request within twenty (20) working days is construed as a denial and waives further exhaustion of administrative appeals that ordinarily apply in FOIA cases. *5 U.S.C. §552(a)(6)(A)(i)*; *5 U.S.C. §552(a)(6)(C)(i)*.

11. Constructive exhaustion of administrative remedies vests this District Court with jurisdiction to resolve all issues regarding Plaintiff's FOIA request. *5 U.S.C. §552(a)(6)(C)(i)* ("Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.").

12. This Court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." *5 U.S.C. § 552(a)(4)(B)*.

13. This Court has statutory authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. This Court has statutory authority to grant injunctive relief pursuant to 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B). The Court retains its full equitable powers to fashion and impose effective remedies for agency FOIA violations. The Court has equitable authority to remedy an agency policy, pattern, and/or practice that violates FOIA's statutory requirements.

14. This Court has statutory authority to refer the matter to the Special Counsel to investigate and remedy circumstances involving potentially arbitrary and capricious practices of withholding agency records by violating FOIA mandates that agencies provide prompt access to agency records. 5 U.S.C. § 552(a)(4)(F).

15. “In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.” 5 U.S.C. § 552(a)(4)(G).

16. The FOIA claims made in this Complaint are ripe for judicial review and Plaintiff’s harms can be remedied by an order of this Court.

III. PARTIES

17. Plaintiff, ROCKY MOUNTAIN WILD (RMW) is a Colorado non-profit corporation located in Denver, Colorado. RMW’s mission is to conserve wildlands for wildlife through protecting, connecting and restoring habitat throughout the Southern Rockies. RMW uses FOIA as an important avenue for gaining informed about agency activities, and is harmed when it is denied documents to which it is entitled. RMW intends to continue its use of FOIA to access agency records in the possession of Defendants. One of the purposes of FOIA is to promote the active oversight role of public advocacy groups. RMW uses FOIA to publicize activities of federal agencies and to mobilize the public to participate in the management of public land. RMW intends to continue using FOIA requests to fulfill its oversight and advocacy role through scrutinizing agency records, a practice Congress intended to promote through the adoption of FOIA. Any person who files a FOIA request is deemed to have standing to invoke the jurisdiction of the Federal Courts to carry out the judicial review provisions of FOIA.

RMW has standing to bring this FOIA suit. RMW brings this action on its own behalf and on behalf of its adversely affected members.

18. Defendant UNITED STATES FOREST SERVICE (“Forest Service”) is a federal agency under the U.S. Department of Agriculture. The Forest Service is responsible for responding to FOIA requests, and is sued as a defendant in this action. Among other things, the Forest Service failed to lawfully respond to Plaintiff’s July 20, 2018 FOIA request within twenty (20) working days. Responsive records are located at all levels of the Forest Service, including local, regional and Washington D.C. Offices. Responsive agency records may also be located in the offices of agency contractors.

19. Defendant UNITED STATES DEPARTMENT OF AGRICULTURE (“USDA”) is a federal agency. The USDA is responsible for responding to FOIA requests, and is sued as a Defendant in this action. Among other things, the USDA failed to lawfully respond to Plaintiff’s July 20, 2018 FOIA request within twenty (20) working days. Among other units of the USDA, responsive agency records are located at the Office of General Counsel and the Under Secretary for Natural Resources and Environment.

IV. STATEMENT OF FACTS AND SUMMARY OF LAW

20. RMW submitted a written FOIA request to FS on July 20, 2018, which was assigned tracking number 2018-FS-R2-05258-F. Ex. 1. On August 7, 2018, the Forest Service sent RMW a letter challenging RMW’s request for a fee waiver and attempting to limit the scope of the request. Ex. 2. On August 16, 2018, RMW responded to the FS letter providing information about its eligibility for a fee waiver and refusing to narrow its request. Ex. 3. On September 5,

2018, the FS sent two letters replying to RMW granting the fee waiver and assigning a second tracking number (2018-FS-R2-05942-F) to the portion of RMW's request regarding records generated during litigation. Ex. 4. The 20-working-day FOIA deadline expired on August 17, 2018, without a determination from the Forest Service.

21. Defendants have not provided a final determination on the July 20, 2018 FOIA request. None of the Forest Service letters constitutes a lawful determination.

22. FOIA was amended in 2007 to confirm that Congress, through FOIA, continues to seek to "ensure that the Government remains open and accessible to the American people and is always based not upon the 'need to know' but upon the *fundamental 'right to know.'*" Pub. L. No. 110-175, 121 Stat. 2524, Section 2 ¶6 2007) (*emphasis supplied*).

23. This lawsuit is necessary based on the Forest Service's failure to make a determination on Plaintiff's FOIA request within twenty (20) working days. 5 U.S.C. §552(a)(6)(A)(i). Under circumstances not present here, an agency may extend that deadline by 10 working days for "unusual circumstances." 5 U.S.C. §552(a)(6)(B). Defendants did not identify any "unusual circumstances."

24. On information and belief, Defendants have a repeated practice of failing to assign the necessary resources to meet FOIA's statutory deadlines, Defendants have access to the necessary resources to meet FOIA's statutory deadlines, and the Forest Service arbitrarily and capriciously elects to allocate its resources to agency activities and actions that do not involve statutory deadlines; such as the deadlines imposed by FOIA.

25. FOIA's 2007 amendment provides that when a Court compels improperly withheld agency records and assess reasonable attorney fees and other litigation costs against the United States, that "the court additionally issues a written finding that the circumstances surrounding

the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to [the] withholding . . .” 5 U.S.C. § 552(a)(4)(F).

26. Plaintiff was required to engage in litigation against Defendants to attempt to enforce each of its past three FOIA requests on similar subject matter. *See Colorado Wild v. Clark*, 05-cv-01173-JLK-DW; *RMW v. Forest Service*, 14-cv-02496-WYD-KMT (D. Colo 2014), and *RMW v. Forest Service*, 15-cv-00127-WJM-CBS. Defendants were found to be in violation of the FOIA in all of these past FOIA challenges and many thousands of pages of withheld records were disclosed in each case. Each FOIA violation diminished Plaintiff’s attempt to participate in the government actions involving the Wolf Creek Village proposal. The Defendants’ underlying actions related to each FOIA also violated other federal laws and could not survive judicial review. The violations alleged in this Complaint in conjunction with the violations alleged in the past actions demonstrate an ongoing pattern, practice, and policy of arbitrary and capricious treatment of Plaintiff’s FOIA requests.

27. This lawsuit requests an order declaring that Defendants violated FOIA, declaring that Defendants continue to violate FOIA, directing Defendants to immediately issue determinations on Plaintiff’s July 20, 2018 FOIA request, and directing all requested records be provided by a date certain. This lawsuit seeks judicial resolution and remedy of all FOIA-related issues that may arise during this litigation. This lawsuit also seeks an injunction prohibiting the Forest Service from taking any further action on the Wolf Creek Village proposal until the FOIA/NEPA violations are remedied.

V. FIRST CLAIM FOR RELIEF

Violation of the Freedom of Information Act: *Defendants have Unlawfully Withheld Agency Records which Plaintiff's requested pursuant to FOIA.*

28. Plaintiff repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

29. Defendants violated FOIA (5 U.S.C. §552(a)) and thereby withheld responsive agency records by failing to provide a lawful determination and response to Plaintiff's July 20, 2018, request for agency records within the statutory period. 5 U.S.C. §552(a)(6)(A)(i).

30. Defendants have issued only preliminary responses that unlawfully withhold agency records requested by Plaintiff's July 20, 2018, FOIA Request for agency records. *Id.*

31. Defendants continue to withhold responsive agency records by failing to make the required determination on Plaintiff's July 20, 2018, request for agency records. *Id.*

32. Defendants continue to violate FOIA by failing to conduct and document a lawful search for responsive records, which is a condition precedent to a lawful determination. On information and belief, responsive agency records have been withheld due to an unlawfully narrow search. 5 U.S.C. § 552(a)(3)(B-C).

33. Defendants continue to violate FOIA by illegally withholding agency records that are responsive to the July 20, 2018 FOIA Request for records, but which Defendants have not demonstrated are subject to any FOIA withholding provision. 5 U.S.C. § 552(b).

34. The Court can remedy Defendants' violation of FOIA and vindicate RMW's right to prompt FOIA access by "enjoin[ing] the agency from withholding agency records and [ordering] the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

VI. SECOND CLAIM FOR RELIEF

Violation of the Freedom of Information Act: *Defendants conduct Raises Questions of Arbitrary and Capricious Actions When Defendant Unlawfully Withheld Agency Records that Plaintiff's Requested Pursuant to FOIA.*

35. Plaintiff repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

36. Defendants conduct in withholding agency records responsive to the FOIA request involves circumstances that raise questions on whether agency personnel acted arbitrarily or capriciously when imposing administrative deadlines on Plaintiff and taking agency action not constrained by statutory deadlines while violating Plaintiff's rights involving timely FOIA access to agency records.

37. Defendants' conduct is properly addressed by referral to Special Counsel for further investigation and remedy of the arbitrary and capricious conduct. 5 U.S.C. § 552(a)(4)(F).

VII. THIRD CLAIM FOR RELIEF

Violation of the Freedom of Information Act: *Equitable Remedy of Violation of Freedom of Information Act – Defendants' Policies, Patterns, and Practices Unlawfully Withhold Agency Records Requested by Plaintiff*

38. Plaintiff repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

39. Defendants have a pattern and practice of not complying with FOIA's statutory requirements in a timely manner.

40. Defendants have a policy, pattern, and practice of violating FOIA by illegally withholding agency records that are responsive to FOIA requests by delaying the processing of agency records that are not subject to any FOIA withholding provision. 5 U.S.C. § 552(b).

41. Defendants have a policy, pattern, and practice of violating FOIA by illegally withholding agency records that are responsive to FOIA requests, but which are not subject to any FOIA withholding provision. 5 U.S.C. § 552(b).

42. Rocky Mountain Wild submitted its FOIA request in order to participate in the NEPA process and Forest Service administrative decisionmaking process.

43. NEPA ensures that all agencies shall make available through Freedom of Information Act the "environmental impact statements, the comments received, and any underlying documents available to the public pursuant to [FOIA], without regard to the exclusion for interagency memoranda where such memoranda transmit comments of the Federal agencies on the environmental impact of the proposed action." 40 C.F.R §1506.6(f).

44. The Forest Service has not provided a response to the FOIA request that sought documents RMW sought to use in the agency administrative proceedings.

45. Plaintiff's ability to engage in the public participation components of Defendants' Wolf Creek Access Project decisions has been harmed, and can be remedied by enjoining Defendants from acting on this decision, reopening Defendants' administrative objection deadlines that accrued after the July 20, 2018 FOIA deadline for a reasonable period of time to allow Plaintiff to participate in mandatory agency decisionmaking processes with the benefit of the information and knowledge provided by the requested agency records.

VI. REQUEST FOR RELIEF

FOR THESE REASONS, Plaintiff respectfully requests that this Court enter judgment providing the following relief:

A. Declare that Defendants have violated FOIA by unlawfully withholding agency records responsive to Plaintiff's July 20, 2018 request for records;

B. Declare that Defendants' violated its duty to comply with FOIA's statutory deadlines;

C. Enter a finding that Defendants' conduct involves circumstances that raise questions of whether the agency has unlawfully, arbitrarily, and/or capriciously withheld agency records, and refer the matter for administrative investigation and remedy (5 U.S.C. § 552(a)(4)(F));

D. Direct by injunction that Defendants provide Plaintiff a lawful determination on its July 20, 2018 request for records by a date certain;

E. Direct by injunction that Defendants conduct a lawful search and provide Plaintiff with all responsive agency records by a date certain;

F. Direct by injunction, based on FOIA and the Court's equitable power, that Defendants shall not take any agency action involving the Wolf Creek Village proposal until 45 days after Plaintiff's FOIA rights are satisfied and by providing the currently withheld agency records and allowing Plaintiff to amend its administrative filings, informed by the FOIA release; 40 C.F.R. §1506.6(a, f).

G. Direct by injunction that Defendants take no final agency action and issue no easement or special use permit addressed by the July 20, 2018 FOIA request until at least 45 days after Plaintiff's FOIA rights are satisfied by providing the currently withheld agency records;

H. Grant Plaintiff's cost of litigation, including reasonable attorney fees as provided by FOIA, 5 U.S.C. § 552(a)(4)(E); Fed. R. Civ. P. 54(d), and/or under any other authority of the Court;

I. Provide such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED November 29, 2018:

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